

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CRAIGSLIST, INC., a Delaware	)	Case No. 11-3545 SC
corporation,	)	
	)	ORDER DENYING MOTION FOR
Plaintiffs,	)	<u>DEFAULT JUDGMENT</u>
	)	
v.	)	
	)	
TERRENCE BRANLEY, a California	)	
resident, BRIAN LACK, a Nevada	)	
resident, and DOES 1 through 25,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	

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**I. INTRODUCTION**

This case centers on allegations of copyright infringement and contractual breach. Plaintiff craigslist, Inc. ("Plaintiff") operates the website [www.craigslist.org](http://www.craigslist.org) ("website" or "craigslist"), an online service for posting and responding to classified ads. Plaintiff asserts that Defendants Terrence Branley and Brian Lack (collectively, "Defendants") used craigslist to run an advertising scam by circumventing the website's security measures and posting thousands of fake advertisements for rental properties, in violation of craigslist's Terms of Use and various federal and state laws.

Now before the Court is a Motion for Default Judgment brought by Plaintiff against both Defendants. ECF No. 35 ("Mot."). Neither Defendant has appeared in this case, and the Clerk of the

1 Court has entered default against both of them. ECF Nos. 25 (Lack  
2 default), 29 (Branley default). Nevertheless, having carefully  
3 considered Plaintiff's papers, the Court DENIES the Motion for  
4 Default Judgment.

5  
6 **II. BACKGROUND**

7 Because both Defendants have defaulted, the Court accepts the  
8 facts of the Complaint as true. Geddes v. United Fin. Group, 559  
9 F.2d 557, 560 (9th Cir. 1977). The craigslist website provides  
10 "free localized online classified ad services and discussion forums  
11 in hundreds of cities worldwide. More than 50 million Americans  
12 alone visit [craigslist] and post more than 40 million ads each  
13 month." Compl. ¶ 21. The craigslist website allows users to  
14 review or post online local classified advertisements for various  
15 categories of products and services. Id. ¶¶ 24-26. Plaintiff's  
16 Terms of Use ("TOU") govern its services and website. Id. ¶ 30.  
17 Users of craigslist must affirmatively accept the TOU to post ads  
18 or create an account. Id. ¶ 31. The TOU grant users a limited,  
19 revocable, nonexclusive license to access Plaintiff's website and  
20 services. Id. ¶ 32. The TOU prohibit, among other things: posting  
21 advertisements on behalf of others; accessing craigslist to  
22 facilitate posting advertisements on behalf of others; using a  
23 Posting Agent<sup>1</sup> to post advertisements; and using automated posting  
24 devices.<sup>2</sup> Id. ¶ 33.

25  
26 <sup>1</sup> Plaintiff alleges that a Posting Agent is "a third-party agent,  
service, or intermediary that posts content to [craigslist] on  
behalf of others . . . ." Compl. ¶ 33.

27  
28 <sup>2</sup> Plaintiff alleges that an "automated posting device" is "any  
automated device or computer program" that enables a user to post  
an advertisement on craigslist "without each posting being entered

1 The craigslist website is a work of authorship protected by  
2 copyright law. Id. ¶ 70. Plaintiff owns all right, title, and  
3 interest, including copyrights in the website, the posted  
4 classifieds, account registration, and account log-in expressions  
5 and compilations. Id. ¶ 71. The craigslist website displays  
6 copyright notices. Id. Plaintiff has registered copyrights in the  
7 website, including its post-to-classifieds, account registration  
8 and account log-in features. Id. ¶ 72.

9 Plaintiff employs a variety of technological measures to  
10 secure its intellectual property and protect the craigslist website  
11 against improper use. See generally id. ¶¶ 49-65. Two protective  
12 measures that are particularly relevant to the instant Motion are  
13 "phone-verified accounts" ("PVAs") and "CAPTCHAs." Plaintiff  
14 requires users to have a PVA to post advertisements in certain  
15 categories on craigslist. Id. ¶ 51. To create a PVA, a user must  
16 provide the craigslist website with a telephone number; craigslist  
17 sends a temporary passcode to the telephone number; the user then  
18 verifies receipt of the passcode by entering it on craigslist. Id.  
19 ¶ 52. This verification process is designed to regulate access to  
20 craigslist and thereby discourage improper posting. Id. ¶¶ 50-51.

21 Plaintiff also requires users to complete a "CAPTCHA"  
22 challenge before posting an advertisement on craigslist. Id. ¶ 54.  
23 CAPTCHA requires a user to decipher "partially obscured words or  
24 characters that humans can read but computer programs . . . usually  
25 cannot." Id. ¶ 55. CAPTCHA is supposed "to ensure that ads are  
26 posted manually (as required by the TOU) and not by automated means  
27

28 manually." Compl. ¶ 33. These devices can be used "to submit  
postings in bulk." Id.

1 . . . ." Id. ¶ 56.

2 Plaintiffs allege that Defendants "have knowingly and  
3 willfully violated [the] TOU and various federal and state laws to  
4 engage in massive ad posting by automated means on [craigslist] . .  
5 . ." Id. ¶ 73. According to Plaintiff, Defendants "operate  
6 Posting Agent businesses whereby they post ads to [craigslist] on  
7 behalf of others in violation of [the] TOU." Id. ¶ 74.<sup>3</sup> Plaintiff  
8 alleges that Defendants use "CLAD Genius," an automated posting  
9 device, to create and post craigslist advertisements for others.  
10 Id. ¶ 75. CLAD Genius is equipped with features designed to  
11 electronically circumvent craigslist's CAPTCHA challenges and to  
12 automatically create PVAs. Id. ¶ 76. Plaintiff alleges that  
13 Branley uses CLAD Genius to post fabricated real estate  
14 advertisements on craigslist "by copying the titles of old ads in  
15 the craigslist housing section, deleting identifying information  
16 from the body of such ads, lowering the rental rate listed for the  
17 property, and then inserting photographs of other random properties  
18 taken from [other] real estate websites . . . ." Id. ¶¶ 78-79.

19 As for Lack, Plaintiff alleges that he operated the website  
20 www.autopvemaker.com, where he sold a software script called "Auto  
21 PVA Maker," used for automatically generating craigslist PVAs. Id.  
22 ¶ 80. Lack advertised this product as working "directly with CLAD  
23 Genius." Id. ¶ 81. Plaintiff alleges that it sent Lack a series  
24 of cease-and-desist letters, to which Lack responded first by  
25 changing the name of his website to conceal his continued misdeeds,

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26 <sup>3</sup> The Complaint names BD Marketing, LLC ("BDM") as a Defendant, but  
27 Plaintiff voluntarily dismissed its claims against BDM without  
28 prejudice. ECF No. 30. Plaintiff alleges that "Defendant Branley  
is the President and Defendant Lack is the founder of [BDM]." Compl. ¶ 77.

1 and then shutting down the two websites Plaintiff alleges he ran.  
2 Id. ¶¶ 82-86. Plaintiff alleges that Lack nevertheless "continues  
3 to violate [Plaintiff's] TOU by operating as a Posting Agent." Id.  
4 ¶ 87.

5 Plaintiff alleges that Defendants affirmatively accepted  
6 Plaintiff's TOU at one or more times when accessing craigslist and  
7 posting advertisements, id. ¶ 91, but that notwithstanding their  
8 acceptance of the TOU they "accessed, and continue to access,  
9 [craigslist] without authorization or in excess of authorization,"  
10 id. ¶ 88. On the basis of these and other allegations contained in  
11 the Complaint, Plaintiff asserts the following six claims: (1)  
12 violations of the Digital Millennium Copyright Act, 17 U.S.C. §§  
13 1201 et seq.; (2) violations of the Computer Fraud and Abuse Act,  
14 18 U.S.C. § 1030; (3) violations of California Penal Code § 502;  
15 (4) breach of contract; (5) fraud; and (6) violations of  
16 California's Unfair Competition Law, Cal. Bus. & Prof. Code §§  
17 17200 et seq.

### 18 19 **III. LEGAL STANDARD**

20 After entry of a default, the Court may enter a default  
21 judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do  
22 so, while "discretionary," Aldabe v. Aldabe, 616 F.2d 1089, 1092  
23 (9th Cir. 1980), is guided by several factors. As a preliminary  
24 matter, the Court must "assess the adequacy of the service of  
25 process on the party against whom default judgment is requested."  
26 Bd. of Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. 00-  
27 0395 VRW, 2000 U.S. Dist. LEXIS 19065, at \*2 (N.D. Cal. Jan. 2,  
28 2001). If the Court determines that service was sufficient, it

1 should consider whether the following factors support the entry of  
2 default judgment: (1) the possibility of prejudice to the  
3 plaintiff; (2) the merits of plaintiff's substantive claim; (3) the  
4 sufficiency of the complaint; (4) the sum of money at stake in the  
5 action; (5) the possibility of a dispute concerning material facts;  
6 (6) whether the default was due to excusable neglect; and (7) the  
7 strong policy underlying the Federal Rules of Civil Procedure  
8 favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470,  
9 1471-72 (9th Cir. 1986).

10  
11 **IV. DISCUSSION**

12 **A. Adequacy of Service on Branley**

13 Plaintiff claims that Branley was served by substitute service  
14 pursuant to California law. Mot. at 1; ECF No. 26 ("Branley POS")  
15 at 1. Federal Rule of Civil Procedure 4(e) permits service by any  
16 means authorized by the law of the state in which the district  
17 court sits. See Fed. R. Civ. P. 4(e)(1). California law permits  
18 substituted service, but only after a party makes reasonably  
19 diligent attempts at personal service. See Cal. Civ. Proc. Code §  
20 415.20(b). Under California law, substituted service is effected  
21 by:

22 leaving a copy of the summons and complaint at the  
23 person's dwelling house, usual place of abode, usual  
24 place of business, or usual mailing address other than a  
25 United States Postal Service post office box, in the  
26 presence of a competent member of the household or a  
27 person apparently in charge of his or her office, place  
28 of business, or usual mailing address other than a United  
States Postal Service post office box, at least 18 years  
of age, who shall be informed of the contents thereof,  
and by thereafter mailing a copy of the summons and of  
the complaint by first-class mail, postage prepaid to the

1 person to be served at the place where a copy of the  
2 summons and complaint were left. Service of a summons in  
3 this manner is deemed complete on the 10th day after the  
4 mailing.

5 Id.

6 Here, Plaintiff represents that on October 26, 2011, Branley  
7 was served by substitute service on his wife at an address in  
8 Huntington Beach, California, and that Plaintiff's process server  
9 then mailed a copy of the papers to the same Huntington Beach  
10 address. Branley POS at 2, 4. However, the Complaint alleges that  
11 Branley lives at a different address in Fountain Valley,  
12 California. Compl. ¶ 14. Nowhere in its papers does Plaintiff  
13 explain this discrepancy. Assuming without deciding that Plaintiff  
14 satisfied California's requirement of making reasonably diligent  
15 attempts to serve Branley personally before it left the papers with  
16 the person it identifies (without explanation) as Branley's wife,  
17 Plaintiff has not addressed to the Court's satisfaction the  
18 discrepancy between Branley's alleged Fountain Valley residence  
19 address and the Huntington Beach service address. Plaintiff, in  
20 short, has not established that the Huntington Beach address is the  
21 dwelling house or usual place of abode of Branley himself.

22 Because Plaintiff has not yet made the showing of adequate  
23 service that is required for entry of default judgment against  
24 Branley, the Court DENIES WITHOUT PREJUDICE Plaintiff's Motion for  
25 Default Judgment against him.

26 **B. Adequacy of Service on Lack**

27 Federal Rule of Civil Procedure 4(e) provides that an  
28 individual may be served by "delivering a copy of the summons and  
of the complaint to the individual personally." Fed. R. Civ. P.

1 4(e)(2)(A). Here, Plaintiff caused Lack to be personally served in  
2 San Francisco. ECF No. 21 ("Lack POS"). The Court determines that  
3 service on Lack was adequate and therefore proceeds to applying the  
4 Eitel factors.

5 **C. Application of Eitel Factors to Case Against Lack**

6 Taken together, the second and third Eitel factors essentially  
7 require that "a plaintiff state a claim on which [it] may recover."  
8 Pepsico, Inc. v. Cal. Sec. Cans, 238 F. Supp. 2d 1172, 1175 (C.D.  
9 Cal. 2002) (internal quotations omitted). Both requirements must  
10 be met: that is, Plaintiff must not only state a cognizable claim,  
11 but the claim must be one on which the Court can afford relief.  
12 Here, Plaintiff seeks three kinds of relief against Lack: a  
13 permanent injunction against further infringement of Plaintiff's  
14 copyrights and violations of the TOU; liquidated damages of  
15 \$1,756,400 for Lack's alleged breaches of the TOU; and attorney  
16 fees and costs in excess of \$50,000. Mot. at 16-17.

17 The Court DENIES WITHOUT PREJUDICE Plaintiff's request for  
18 attorney fees because, as explained below, the Court believes  
19 Plaintiff has not yet established that it is entitled to a default  
20 judgment granting the relief it seeks against Lack.

21 **1. Permanent Injunction Against Lack**

22 The Court DENIES WITHOUT PREJUDICE Plaintiff's request for a  
23 permanent injunction against Lack because the Court finds that  
24 Plaintiff has not adequately alleged the likelihood of irreparable  
25 harm. Even in copyright cases, plaintiffs seeking injunctive  
26 relief must show that they are entitled to it pursuant to  
27 "traditional equitable considerations." See eBay Inc. v.  
28 MercExchange, L.L.C., 547 U.S. 388, 392-93 (2006). One of these



1 considerations is whether Plaintiff can establish "a likelihood of  
2 irreparable harm." See Flexible Lifeline Sys., Inc. v. Precision  
3 Lift, Inc., 654 F.3d 989, 998 (9th Cir. 2011). Plaintiff entirely  
4 fails to engage this question, or any other part of the four-factor  
5 test traditionally applied by courts of equity and whose continuing  
6 vitality was affirmed in eBay.

7 Plaintiff's only allegation concerning Lack's possible future  
8 misconduct is a single, conclusory statement that Lack "continues  
9 to violate [the] TOU by operating as a Posting Agent." Compl. ¶  
10 87. This is not enough to state a plausible claim for injunctive  
11 relief because Plaintiff has not alleged facts sufficient to  
12 support its conclusion that Lack "continues" to act as a Posting  
13 Agent. And injunctive relief will not be granted solely on the  
14 basis of allegations of past injury. See Mortensen v. Cnty. of  
15 Sacramento, 368 F.3d 1082, 1086 (9th Cir. 2004).

16 The Court DENIES WITHOUT PREJUDICE Plaintiff's Motion for  
17 Entry of Default Judgment against Lack with respect to the  
18 requested permanent injunction.

19 2. Liquidated Damages Against Lack

20 In addition to a permanent injunction, Plaintiff seeks over  
21 \$1.7 million in liquidated damages from Lack. Plaintiff bases its  
22 figure on facts contained in a declaration submitted by Plaintiff's  
23 counsel ("Hennessy"). ECF No. 37 ("Hennessy Decl.") Hennessy  
24 declares that after the Complaint was filed in this case, Branley  
25 contacted him. Id. ¶ 3. Branley wanted to discuss his involvement  
26 "in various craigslist-related businesses." Id. According to  
27 Hennessy, Branley admitted to making thousands of fraudulent  
28 postings on craigslist. Id.

1 Hennessy also declares that Branley implicated Lack in misuse  
2 of the craigslist website. The declaration states that Branley  
3 told Hennessy that Lack had posted a "diary detailing his  
4 experience operating a craigslist posting business on the 'Posting  
5 Punks' online forum," where Lack, according to Branley, "posted  
6 under the screen name 'Sticky Skunk.'" Id. ¶ 6. Hennessy attaches  
7 to his declaration a printout of part of the Posting Punks online  
8 forum. Id. Ex. C ("Printout"). The Printout shows a user  
9 explaining, under the handle "stickyskunk," how to misuse the  
10 craigslist website by serving as a Posting Agent for automobile  
11 salespeople, who then would pay the Posting Agent a cut of their  
12 increased automobile sales. The Printout contains a running log of  
13 stickyskunk's own efforts to make money at this unpromising  
14 enterprise.

15 Plaintiff takes Branley at his word that stickyskunk and Lack  
16 are one and the same. Plaintiff then uses stickyskunk's online  
17 journal entries to calculate how many times Lack breached the TOU.  
18 For example, in one post stickyskunk says: "For the week of 8/23-  
19 8/29: I have been posting between 500-700 ads per day in the Autos  
20 section, still riding that gravy train!" Printout at 8. From this  
21 statement, Plaintiff determines that stickyskunk has admitted to  
22 serving as a Posting Agent 600 times per day for 6 days, for a  
23 total of 3600 improper posts. Hennessy Decl. ¶ 8. Through similar  
24 processes of inference and estimation, Plaintiff calculates that  
25 stickyskunk made at least 8,782 posts as a Posting Agent. Id.  
26 Plaintiff then turns from these calculations to the TOU, which  
27 purport to provide Plaintiff with \$200 in liquidated damages for  
28 each post made by a Posting Agent. See Mot. at 13. Plaintiff

1 multiplies the \$200 liquidated damages figure by the 8,782 improper  
2 posts it attributes to stickyskunk/Lack, to determine that it is  
3 entitled to liquidated damages from Lack in the amount of  
4 \$1,756,400. Id. at 14.

5 Even if the Court assumes for the sake of argument that  
6 Plaintiff's calculations represent reasonable assessments of  
7 prohibited conduct alleged in the Complaint,<sup>4</sup> and that the \$200  
8 liquidated damages figure is reasonable, all of Plaintiff's  
9 evidence concerning Lack's identity as stickyskunk, as well as  
10 stickyskunk's posting activities -- indeed, Hennessy's entire  
11 conversation with Branley -- is hearsay, or relies on hearsay for  
12 its relevance. The Court does not discern any applicable  
13 exceptions to the hearsay rule and Plaintiff, not having addressed  
14 the issue of hearsay, offers none. Mindful of Eitel's fourth  
15 factor, the sum of money at stake in the action, the Court is not  
16 inclined to award Plaintiff \$1.7 million in damages on the basis of  
17 hearsay alone.

18 On balance, the other Eitel factors also weigh in favor of  
19 denying Plaintiff's motion. Given the problems of proof just  
20 discussed, the Court has reservations about the merits of  
21 Plaintiff's claim for liquidated damages against Lack. The Court  
22 is also concerned about the "fit" between the allegations in the  
23 Complaint, which center on software distribution, and the evidence  
24 presented on both liability and damages, which center on the auto-  
25 advertising scheme. Thus the second and third Eitel factors weigh  
26 against entry of default judgment. Additionally, the Court finds

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27 <sup>4</sup> The Court notes that the Complaint's allegations focus on Lack's  
28 distribution of infringing software and do not mention Lack's  
involvement in any illicit auto-advertising scheme.

1 that there is a high possibility of dispute concerning material  
2 facts, namely, the identity of stickyskunk and the amount of times  
3 he violated the TOU by acting as a Posting Agent. Thus, the fifth  
4 Eitel factor also weighs against entry of summary judgment, as does  
5 the seventh Eitel factor, the strong policy in favor of decisions  
6 on the merits.

7 This leaves the first and sixth Eitel factors: respectively,  
8 the possibility of prejudice to Plaintiff and the possibility that  
9 Lack's default was due to excusable neglect. Though these factors  
10 weigh in favor of default judgment for the reasons raised by  
11 Plaintiff, Mot. at 8, 12, on the facts now before the Court they do  
12 not outweigh the other five factors. The Court accordingly DENIES  
13 WITHOUT PREJUDICE Plaintiff's Motion for Default Judgment against  
14 Lack.

15  
16 **V. CONCLUSION**

17 For the foregoing reasons, the Court DENIES WITHOUT PREJUDICE  
18 the Motion for Default Judgment filed by Plaintiff craigslist,  
19 Inc., against Defendants Terrence Branley and Brian Lack.

20  
21 IT IS SO ORDERED.

22  
23 Dated: March 16, 2012

24   
UNITED STATES DISTRICT JUDGE